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Supreme Court, U.S.
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No. 02-1466

IN THE

Supreme Court of the United States

BERTRAND R. FAVREAU, II, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF NATIONAL VETERANS LEGAL SERVICES PROGRAM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1) Is a service member who is involuntarily discharged for not meeting weight and fitness standards obligated to refund an enlistment or reenlistment bonus on the ground that he or she has "voluntarily" failed to "complete the term of enlistment for which a bonus was paid" within the meaning of the governing statutes?

2) May a court disregard an agency's published regulations by (a) treating unpublished, internal agency memoranda as legally binding "regulations" whose terms prevail over the published regulations, and (b) granting *Chevron/Mead* deference to an agency's statutory construction set forth in litigation affidavits that contradict the published regulations?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae National Veterans Legal Services Program (NVLSP) is an independent non-profit organization dedicated to helping veterans whom our country's institutions have failed.[1] NVLSP first focused its efforts on soldiers who emerged from the military with less-than-fully-honorable discharges, many of whom were young, undereducated, and from minority backgrounds. More recently, NVLSP has also advocated and litigated on behalf of disabled veterans. The ruling below deprives discharged veterans of a central element of their compensation in conflict with the plain meaning of the statute and official regulation, and NVLSP thus has an interest in the proper resolution of a question of federal law that affects thousands of this country's veterans.

INTRODUCTION

Named petitioners in this case are fifteen individuals who were separated from the military for failure to meet weight or fitness standards. They represent a certified class of thousands of others similarly situated. The government has stipulated that each named petitioner was involuntarily separated. It is also undisputed that each tried in good faith to meet the standards, but was unsuccessful. The named petitioners had received enlistment bonuses ranging from $1,000 to $30,000.

Pursuant to 37 U.S.C. § 308a(b) (now § 309), a service member "who *voluntarily*, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him . . . shall refund" a portion of the bonus

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[1] No party authored this brief in whole or in part. No person other than *amicus curiae*, its members, and its counsel has made a monetary contribution to the preparation or submission of this brief.

Both parties have consented to the submission of this brief.

proportional to the unexpired term of the enlistment. 37 U.S.C. § 308a(b) (1998) (repealed 2000) (emphasis added). The regulation implementing this statute is more detailed, providing that "the term 'who voluntarily or because of misconduct' includes (but is not limited to) members separated . . . upon the application and interest of the member because of special or unusual circumstances including, but not limited to . . . overweight/obesity or lack of physical fitness." 7A Dep't of Def., DOD 000 7000.14-R, *Financial Management Regulation: Military Pay Policy and Procedures – Active Duty and Reserve Pay* § 090503(M)(6) (May 2003) ("*FMR*"). Both the statute and the regulation are clear that only the service member's voluntary decision to separate from the military justify recoupment. The regulation further clarifies that separation for reasons of weight or lack of fitness are voluntary only if the service member applies for separation on that basis.

Despite the plain language of both the statute and the regulation, the government has sought to recoup the enlistment bonuses of petitioners, all of whom were involuntarily discharged by the military because they were deemed overweight or unfit. To justify this conduct, the government relies solely on affidavits prepared for this litigation that attempt to relate two internal memoranda by Assistant Defense Secretaries to the statute and regulation at issue. In accepting the government's position and holding that "[t]he Korb memo is a regulation entitled to the force and effect of law," Pet. App. 11a n.11, the Court of Appeals adopted an interpretation that contravenes the plain meaning of the statute and the regulations, in conflict with decisions of this Court and the United States Court of Appeals for the Tenth Circuit. It is imperative that this Court resolve these important issues of federal law that affect thousands of service members.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS MISREAD THE STATUTE, CREATING A CONFLICT BETWEEN THE CIRCUITS, AND FAILED TO DEFER TO THE GOVERNING REGULATION.

The statutory language governing this case is plain: a service member "who *voluntarily*, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him . . . shall refund" a portion of the bonus proportional to the unexpired term of the enlistment. 37 U.S.C. § 308(d)(1) (emphasis added). The language of 37 U.S.C. § 308a(b) (1998) (repealed 2000) is identical in relevant part. Under the statutes, the government may recoup enlistment or reenlistment bonuses only if the member has voluntarily failed to complete his or her term of service, or has committed misconduct. Petitioners were all involuntarily separated from the armed forces, as the government has stipulated. Pet. App. 19a. Thus, none of them voluntarily failed to complete the term of service. As the court below noted, its contrary conclusion conflicts with that of the Tenth Circuit in *Iliff* v. *Schlessinger*, 539 F.2d 1275 (10th Cir. 1976). Pet. App. 19a-20a n.18.

The Court of Appeals held that the term "voluntary" in the statute could encompass petitioners' failure to complete their terms of service because "the underlying reasons prompting separation relate to acts of volition." Pet. App. 20a. However, the statute is clear that the word "voluntarily" refers to the failure to complete the term of service itself, and not to underlying conduct. Further, it is undisputed that petitioners made diligent, good-faith efforts to comply with weight and fitness requirements. They were not discharged because they chose not to meet the requirements; rather, they were discharged because *despite* performing all the "acts of volition" required by the services' remedial programs, the results of those acts did not meet military standards.

Even if the statute were ambiguous, "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor," and Congress is presumed to be familiar with this canon of interpretation when it drafts legislation. *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-21 n.9 (1991). The *King* presumption reinforces the conclusion that only a voluntary decision not to complete the term of service, or misconduct, can justify recoupment.

Leaving aside the statute's plain language, the Court of Appeals' application of *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) to this case was fundamentally misguided: instead of deferring to the Department's clearly worded regulation, as *Chevron* requires in cases of statutory ambiguity, the court instead relied on to affidavits prepared for litigation and outdated, internal agency memoranda that were not available to petitioners or the public until this litigation began.

Defense Department Financial Management Regulation 090503 states that for bonus recoupment purposes, "the term 'who voluntarily or because of misconduct' includes (but is not limited to) members separated . . . upon the application and interest of the member because of special or unusual circumstances including, but not limited to . . . overweight/obesity or lack of physical fitness." 7A *FMR* § 090503(M)(6). The regulation is even more specific than the statute: separation for failure to meet weight or fitness requirements is only "voluntar[y]" if the member applies for the separation. Under *Chevron*, if the Court of Appeals was correct in finding the statute to be ambiguous, it was bound by this "permissible construction of the statute." 467 U.S. at 843.

The court below acknowledged that "[t]he Secretary of Defense is granted explicit authority to implement these provisions through regulations, and has done so." Pet. App.

8a.[2] The court justified its disregard of this explicit regulatory language with its comment that "by themselves the regulations are insufficient," *id.* at 20a. Instead of relying on the clear language of the regulation, the court turned to a "package" of materials and practices, "all knit together by the affidavit of Col. Little." *Id.* at 21a. There is no need for *post hoc* affidavits to make sense of the regulation, which clearly addresses petitioners' situation. Nor was the court's heavy reliance on litigation affidavits appropriate. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

More important, the affidavits and memoranda on which the Court of Appeals relied flatly contradict the regulation rather than clarifying it. It is well established that an administrative interpretation is not controlling if "it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *see, e.g.*, *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 109 (1995) (O'Connor, J., dissenting) ("And, contrary to the Secretary's argument, [the interpretive rule] cannot be a valid 'interpretation' of the Medicare regulations because it is clearly at odds with the meaning of [the relevant regulation] itself."); *Massachusetts Fair Share* v. *Law Enforcement Assistance Admin.*, 758 F.2d 708, 711 (D.C. Cir. 1985) ("It has long been settled that a federal agency must adhere firmly

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[2] This recognition that Congress designated *regulation*-making authority underlines the implausibility of the court's argument that the regulations merely "codifie[d]" the intent that the court read into the internal memoranda. Pet. App. 16a. It is clear, and the court below recognized, that the Department of Defense issued the regulations that were drafted by the Defense Finance and Accounting Service, *id.* at 13a; those are the official, public regulations of the Department. Whatever unspoken policies the Department meant to incorporate in the regulation, the language of the issued regulation is effective until the agency publicly rescinds or replaces it and, in the case of rescission, provides a reasoned explanation. *Motor Vehicles Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983).

to self-adopted rules by which the interests of others are to be regulated.").

The Department's rules clearly state that a voluntary separation for weight or fitness reasons is one that the service member requests. Petitioners were not voluntarily separated.

II. THE DECISION BELOW THAT AN UNPUBLISHED INTERNAL MEMORANDUM HAS THE FORCE AND EFFECT OF LAW CONFLICTS WITH THIS COURT'S PRECEDENT.

The court's analysis of the statute and regulation, wrong on its own terms, is predicated on a ruling that conflicts with decisions of this Court and indeed fundamental principles of due process: namely, that a secret internal memorandum has "the force and effect of law." Pet App. 11a n.11. The most basic requirement of due process is that the law be made public. If laws are secret, the rule of law degenerates into the rule of those who claim to know the law.

> [A] bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. . . . [I]t is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who . . . wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people.

1 William Blackstone, *Commentaries on the Laws of England* § 2, at 45-46 (photo reprint 1979) (1765). Thus the lawmaker must "enact and publish the law" to make it effective, and due process requires "that 'laws . . . give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" *Texaco, Inc.* v. *Short*, 454 U.S. 516, 532, 535 (1982); *accord Wright* v. *Georgia*, 373 U.S. 284, 293 (1963) (holding that due process

forbade conviction for violating park rule where "neither the existence nor the posting of any such rule has been proved"); cf. *Torres* v. *INS*, 144 F.3d 472, 474 (7th Cir. 1998) ("The idea of secret laws is repugnant. People cannot comply with laws the existence of which is concealed.").

It is fundamentally unfair for the Department to lead service members to believe that a statute or regulation states its interpretation of an issue, only to deprive them of their property (the bonuses) later, on the claim that a secret internal policy represents its true position. *Morton* v. *Ruiz*, 415 U.S. 199, 236-37 (1974); *Vigil* v. *Andrus*, 667 F.2d 931, 938 (10th Cir. 1982) ("we think the [agency] cannot rely on a 'semisecret,' and perhaps tentative, understanding reached months earlier"). The government may not force parties "to litigate with agencies on the basis of secret laws." *United States* v. *Alaska*, 503 U.S. 569, 591 (1992) (internal quotation marks omitted).

The court below held that secret, unpublished memoranda had the "force and effect of law" required to deprive petitioners of their bonuses. The government applies the policies embodied in those memoranda to thousands of enlistees and reenlistees every year. Far more than most citizens, service members must rely on the government's good faith in matters of pay and benefits. The Department betrays that trust when its policies contradict governing statutes and regulations.

III. ENTITLEMENT TO ENLISTMENT AND REENLISTMENT BONUSES IS AN IMPORTANT ISSUE AFFECTING THOUSANDS OF SERVICE MEMBERS.

The importance of enlistment and reenlistment bonuses as a military recruiting tool cannot be disputed. In the late 1990s, the Army, Navy and Air Force began to experience significant recruiting shortfalls and problems retaining certain skilled personnel. Prominent among the responses to these

problems was a significant expansion of enlistment and reenlistment bonus programs. U.S. GAO, GAO/NSAID-00-146, *Military Personnel: Services Need to Assess Efforts to Meet Recruiting Goals and Cut Attrition* 5 (June 2000) ("*Recruiting Report*"). Thus, from 1995 to 1999, expenditures on enlistment bonuses increased more than eightfold (in constant year 2000 dollars) from $21.7 million to $177 million. *Id.* at 7, 9, 11, 13. Similarly, between 1997 and 2002, the cost of the reenlistment bonus program more than tripled from $235 million to an estimated $789 million. U.S. GAO, GAO-03-149, *Military Personnel: Management and Oversight of Selective Reenlistment Bonus Program Needs Improvement* 1 (Nov. 2002) ("*Reenlistment Report*"). Some 59,000 individuals received reenlistment bonuses in 2001. *Id.* at 2.

For individual enlistees, the amounts are substantial: bonuses ranged up to $20,000 for army enlistment bonuses in 2000, *Recruiting Report* at 6, with $3,000 as a typical signing bonus for a high school graduate. Reenlistment bonuses can be as high as $60,000. *Reenlistment Report* at 2. Since basic pay for a high school graduate begins at $13,465 per year, Def. Fin. & Accounting Serv., *2003 Military Pay Rates: Active Duty and Reserve Monthly Drill Pay Tables* (Jan. 1, 2003), *available at* http://www.dfas.mil/money/milpay/pay/01-2003.pdf (updated May 29, 2003), an enlistment bonus forms a significant part of an enlistee's compensation. Further, an enlistee who does not intend to separate from the military has no reason not to spend the enlistment bonus at the time of receipt. Separation from the military alone is a serious financial blow, without the added burden of recoupment.

The outcome of this case will be highly significant not only for the military but for tens of thousands of service members who enlisted in reliance on the bonus programs. In 1994, 25,000 of the military's 176,000 new recruits were discharged

within the first six months of their contracts. U.S. GAO, GAO/NSAID-97-39, *Military Attrition: DOD Could Save Millions by Better Screening Enlisted Personnel* 2 (Jan. 1997). Of those recruits, more than 7,200 were discharged for failure to meet minimum performance criteria. *Id.* at 5. To help address this problem, basic training personnel suggested that recruits be more fully informed of the services' physical training requirements and encouraged to become physically fit before beginning basic training. *Id.* at 5-6. The military is well aware that it is recruiting individuals who are highly unlikely to meet fitness and weight requirements. In turn, those recruits are entitled to know whether and under what circumstances their enlistment bonuses will be forfeit.

The enlistment and reenlistment bonus programs are at the very heart of military recruitment and retention efforts. Of course, any government program should be administered in a lawful manner. But this obligation is especially important when the government undertakes massive commitments on the scale of the enlistment bonus programs. The Department of Defense has chosen to make the bonuses a centerpiece of its recruiting and retention policy. It cannot withdraw from those commitments based on secret policies and rules. The importance of the issues raised, and the conflicts of authority identified above, warrant immediate review by this Court.

CONCLUSION

For all of the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted

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